84-1569

No. _____

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

BARDOMIANO AGUILAR and ROSA AGUILAR, husband and wife, suing pursuant to C.C.P. §376, and suing individually,

Petitioners,

vs.

COUNTY OF LOS ANGELES, LAC/USC MEDICAL CENTER; (FIRST NAME UNKNOWN) CHAN, M.D., and (FIRST NAME UNKNOWN) YOKOCHI, M.D.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Is an injured minor a necessary party under Fed. R. of Civ. Proc. 19 in an action where the parents are pursuing an independent statutory cause of action for recovery of pre-majority medical costs and pre-majority loss of wages occasioned by the injury to the minor?

TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	8
REASONS WHY THE WRIT SHOULD BE GRANTED	12
1. The Ruling Of The Court of Appeals Closes The Door Of The Federal Court To Foreign Nationals Who Are Pursuing Their Independent, Statutorily Created Cause Of Action.	12
2. The Ruling Of The Court Of Appeals Ignores The Specific Wording Of Rule 19 Which Requires That The Absent Party "Claim" An Interest.	17
3. The Appellate Court Decision Incorrectly Concludes That The Child Will Be Collaterally Estopped.	22
CONCLUSION	30

Table of Contents - Continued

APPENDIX A - Opinion of the United States Court of Appeals for the Ninth Circuit

APPENDIX B - Order of the United States District Court Dismissing Action

TABLE OF AUTHORITIES

Cases	Page
Armstrong v. Armstrong, 15 Cal. 3d 942 (1976)	23,24, 26
Bakia [sic] v. County of Los Angeles, 687 F.2d 299 (9th Cir. 1982)	18
Bauman v. San Francisco, 42 Cal. App. 2d 144, 108 P.2d 989 (1940)	14,15-16
Capelouto v. Kaiser Foundation Hospitals, 7 Cal. 3d 891, 500 P.2d 880 (1972)	23
Continental Insurance Co. v. Cotten, 427 F.2d 48 (C.A. 9th Cal., 1970)	19
Cortez v. County of Los Angeles, 96 F.R.D. 427 (C.D. Cal. 1983)	13-15, 22
De Vito v. Hoffman, 199 F.2d 468, 91 App. D.C. 263 (1952)	29
Durkee v. C.P.R.R. Co., 56 Cal. 388, 38 Am. Rep. 59 (1880)	16

Table of Authorities - continued

Cases	Page
Faitz v. Ruegg, 114 Cal. App. 3d 967, 171 Cal. Rptr. 149 (1981)	14,16-17
Green v. Green, 218 F.2d 130 (C.A. 7th, 1954), 20 Fed. R. Serv. 19(a) 1, Case 7, cert. den. (1955), 349 U.S. 917, 75 S.Ct. 606, 99 L.Ed. 1250	18-19
Kaiser Foundation Hospital v. Superior Court, 254 Cal. App. 2d 327, 62 Cal. Rptr. 330 (1967)	22,27
La Chemise Lacoste v. General Mills, Inc., 53 F.R.D. 596 (D. Del. 1971), aff'd 487 F.2d 312 (C.A. 3d, 1973)	20
Lopez v. Martin Luther King, Jr. Hospital, 97 F.R.D. 24 (C.D. Cal. 1983)	10
Margolis v. Superior Court, 151 Cal. App. 2d 333, 311 P.2d 167 (1957)	26
McManus v. Arnold Taxi Corp., 82 Cal. App. 215, 255 P. 755 (1927)	16

Table of Authorities - continued

Cases	Page
Meyerding v. Villaume, 20 F.R.D. 151 (D. Minn. 1957)	20
Morgan Guaranteed Trust Co. v. Martin, 466 F.2d 593 (C.A. 7 Ill., 1972)	19-20
Provident Trademens Bank & Trust Co. v. Patterson, (1968) 390 U.S. 102, 88 S.Ct. 733, 19 L.Ed. 2d 936	18
Ruddock v. Ohls, 91 Cal. App. 3d 271 (1979)	24-25, 26
Seymour v. Union News Co., 217 F.2d 168 (C.A. 7 Ill., 1954)	29
Sove v. Smith, 311 F.2d 5 (6th Cir. 1962)	28-29
Standard Accident Insurance Co. v. Doiron, 170 F.2d 206 (C.A. 1 Mass., 1948)	29
State Farm Insurance Co. v. Salazar, 155 Cal. App. 2d Supp. 861, 318 P.2d 210 (1957)	26

Table of Authorities - continued

Cases	Page
Sullivan v. Thompson, 30 Cal. App. 2d 675, 87 P.2d 62	16
Walton v. United States, 415 F.2d 121 (C.A. 10 Wyo., 1969)	19
Yonofsky v. Wernick, 362 F.Supp. 1005 (S.D. N.Y., 1973)	19
Zaragosa v. Craven, 33 Cal. 2d 315, 202 P.2d 73 (1949)	26
Statutes and Rules	
28 U.S.C. § 1254(1)	2
Fed. R. Civ. P. 12(b)(6)	10
Fed. R. Civ. P. 12(b)(7)	10
Fed. R. Civ. P. 19	2-6,10, 12,17
Fed. R. Civ. P. 19(a)	11,15, 17,19, 30
Fed. R. Civ. P. 19(a)(2)	13,17
Fed. R. Civ. P. 19(b)	11,17

Table of Authorities - continued

Statutes and Rules	Page
Cal. Code Civ. Proc. § 376	6-8,9, 13,15, 16,28
Cal. Prob. Code § 573	8

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

BARDOMIANO AGUILAR and
ROSA AGUILAR, husband
and wife, suing pursuant
to C.C.P. §376, and suing
individually,

Petitioners,

vs.

COUNTY OF LOS ANGELES,
LAC/USC MEDICAL CENTER;
(FIRST NAME UNKNOWN) CHAN,
M.D., and (FIRST NAME
UNKNOWN) YOKOCHI, M.D.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, filed January 15, 1985.

OPINION BELOW

On January 15, 1985, the Court of Appeals for the Ninth Circuit filed and entered its opinion affirming the judgment of the United States District Court entered on November 14, 1983. A copy of the opinion of the Court of Appeals for the Ninth Circuit appears as Appendix "A" attached hereto. The order dismissing the

action appears as Appendix "B" attached hereto.

JURISDICTION

On January 15, 1985, the Court of Appeals for the Ninth Circuit entered judgment affirming the orrder of dismissal. Jurisdiction to review the judgment of the Court of Appeals is conferred upon this Court, and invoked by petitioner, pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

Federal Rule of Civil Procedure 19:

> "(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the

subject matter of action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring

double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder Not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent

to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder."

California Code of Civil Procedure Section 376:

"The parents of a legitimate unmarried minor child, acting jointly, may maintain an action for injury to such child caused by the wrongful act or neglect of another.

. . .

Any such action may be maintained against the person causing the injury. If any other person is responsible for any such wrongful act or neglect the action may also be maintained against such other person. The death of the child or ward shall not debate the parents' or guardian's cause of action for his or her injury as to damages accruing before his or her death. In every action under this section, such damages may be given as under all of the circumstances of the case may be just; except that in

any action maintained after the death of the child or ward or against the executor or administrator of the person causing the injury, the damages recoverable shall be as provided in Section 573 of the Probate Code."

STATEMENT OF THE CASE

On August 2, 1983, appellants Rosa and Bardomiano Aguilar filed a medical malpractice suit against appellees County of Los Angeles, Los Angeles County/U.S.C. Medical Center, and several medical center employees ("County"). The Aguilars alleged that the County's negligence in providing medical care to their minor child, Jaime, caused him to sustain permanent brain damage. Under California Code of Civil

Procedure (C.C.P.) § 376, which provides that parents may maintain an action for injury to their child, the Aguilars sought to recover pre-majority special damages for Jaime's injuries. The Aguilars alleged that they were citizens of Mexico and El Salvador and that the defendants were citizens of California and based the district court's subject matter jurisdiction on diversity of citizenship. Their son Jaime, a California citizen, was not named as a plaintiff in the complaint.

On August 3, 1983, Jaime Aguilar, through his Guardian ad Litem, Rosa Aguilar, filed an action in the Los Angeles Superior Court to recover post-majority special damages and general damages for injuries caused by the County's alleged negligence.

The County moved to dismiss the federal action pursuant to Fed. R. Civ. P. 12(b)(6), failure to state a claim upon which relief can be granted, and Fed. R. Civ. P. 12(b)(7), failure to join a party under Fed. R. Civ. P. 19. On October 24, 1983, the district court granted the motion to dismiss the complaint and action under Fed. R. Civ. P. 12(b)(7) for failure to join Jaime Aguilar, an indispensable party whose joinder would defeat diversity jurisdiction. Adopting the reasoning in Lopez v. Martin Luther King, Jr. Hospital, 97 F.R.D. 24 (C.D. Cal. 1983), the court found that Jaime Aguilar claimed an interest relating to the subject of the action and that disposition of the action in his absence could impair or impede his ability to protect that interest under the California law of collateral estoppel. The

court also determined under Fed. R. Civ. P. 19(a) that the County would be subject to a substantial risk of incurring inconsistent obligations because of Jaime's claimed interest, should the action continue without his joinder as a party. The court further found that, pursuant to Fed. R. Civ. P. 19(b), the actions and complaint should be dismissed.

Thereafter, petitioners appealed to the United States Court of Appeals for the Ninth Circuit, which affirmed the District Court judgment.

In affirming the District Court's judgment, the Court of Appeals held that the possibility that the child may be collaterally estopped by an adjudication in the parents' lawsuit, compels the conclusion that the child should be joined

under Rule 19 and, thus, diversity would be destroyed.

The Court of Appeals concluded that the child should have been joined because under Fed. R. Civ. P. 19(a)(2) he has an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may impair or impeded his ability to protect that interest.

REASONS WHY THE WRIT SHOULD BE GRANTED

1. THE RULING OF THE COURT OF APPEALS CLOSES THE DOOR OF THE FEDERAL COURT TO FOREIGN NATIONALS WHO ARE PURSUING THEIR INDEPENDENT, STATUTORILY CREATED CAUSE OF ACTION.

The parents' right to sue under C.C.P. § 376 is an independent right, in which a child has no legal interest; it is independent of the minor's right to sue for post-majority special damages as well as general damages.

California Code of Civil Procedure Section 376 provides as follows:

> "The parents of a legitimate unmarried minor child, acting jointly, may maintain an action for injury to such child caused by the wrongful act or neglect of another. . ."

The court in Cortez v. County of Los Angeles, 96 F.R.D. 427 (C.D. Cal. 1983) states as follows:

> "In this case, Section 376 of the California Code of

Civil Procedure provides the plaintiffs with a separate and independent cause of action from that asserted by Adrian in state court. As stated in Bauman v. San Francisco, 42 Cal. App. 2d 144, 162, 108 P.2d 989, 999 (1940): 'The parents of a minor are normally responsible for medical and hospital care furnished the minor, and the cause of action to recover these items normally rests with the parents.' See also Faitz v. Ruegg, 114 Cal. App. 3d 967, 171 Cal. Rptr. 149 (1981). Although

> Adrian has an obvious financial stake in the outcome of his parents' lawsuit, this alone is not the legally protected 'interest' required to invoke Rule 19(a)."

The independent right of action set forth in C.C.P. Section 376 owes its derivation to a long line of California cases, cited with approval in Bauman v. San Francisco, 42 Cal. App. 2d 144, 161 (1940), where the Court stated:

> "The rule has been frequently stated that where the injured child is living with, and is being supported by, the parents, they are primarily responsible for the child's care

and maintenance, and for that reason the cause of action to recover such expenses rests with them and not with the injured minor. (McManus v. Arnold Taxi Corp., 82 Cal. App. 215, 255 P. 755 (1927); Durkee v. C.P.R.R. Co., 56 Cal. 388, 38 Am. Rep. 59 (1880); Sullivan v. Thompson, 30 Cal. App. 2d 675, 87 P.2d 62.) . . ."

The case of Faitz v. Ruegg, 114 Cal. App. 3d 967, 971 (1981), which states beyond peradventure of a doubt that the right which is being advanced under C.C.P. Section 376 belongs to the parent, absent waiver or estoppel. That case states:

"The right to recover for loss of the child's earnings and for medical expenses incurred in treating its injuries belongs to the parent. . ." (emphasis added)

2. THE RULING OF THE COURT OF APPEALS IGNORES THE SPECIFIC WORDING OF RULE 19 WHICH REQUIRES THAT THE ABSENT PARTY "CLAIM" AN INTEREST.

Requirements of Rule 19(a)(2):

Whether joinder is to occur is first measured under the provisions of Rule 19(a), and, only thereafter will the considerations of Rule 19(b) come into play. It must first be determined whether the

absent person's interest in the litigation is sufficient to satisfy the requirements of Rule 19(a). Provident Trademens Bank & Trust Co. v. Patterson, 390 U.S. 102, 88 Sup. Ct. 733, 19 L.Ed. 2d 936, (1968). See also Bakia [sic] v. County of Los Angeles, 687 F.2d. 299 (9th Cir. 1982).

Secondly, the absent party must claim the interest.

The fundamental test is whether or not harm will occur to the absent minor child. In the case of Green v. Green, 218 F.2d 130, 143 (C.A. 7, 1954), 20 Fed. R. Serv. 19(a) 1, Case 7, cert. den. (1955), 349 U.S. 917, 75 S.Ct. 606, 99 L.Ed. 1250, the court stated:

> "It is a fundamental principle that a party is not indispensable where a decree can be rendered between the

parties actually before the court without prejudicially, adversely or injuriously affecting an absent party."

It is axiomatic that the absent party cannot claim an interest that he does not have. Rule 19(a) requires that the absent party must have an interest which is directly affected legally by the adjudication, and he cannot claim an interest which he does not possess. Walton v. United States, 415 F.2d 121 (C.A. 10 Wyo., 1969); Yonofsky v. Wernick, 362 F.Supp. 1005 (S.D.N.Y., 1973). Secondly, the absent party must claim the interest. Joinder will not be permitted if an interest is expressly disclaimed. Continental Insurance Co. v. Cotten, 427 F.2d 48 (C.A. 9 Cal., 1970); Morgan Guaranteed Trust Co.

v. Martin, 466 F.2d 593 (C.A. 7 Ill., 1972).

In the case of Meyerding v. Villaume, 20 F.R.D. 151, 153 (D. Minn. 1957), the court stated:

> "If justice to the parties before the court can be done without injury to absent persons, the motion (to dismiss for failure to join indispensable parties) should not be (granted). . ."

The "interest relating to the subject matter of the action" that makes an absent person a party needed for just adjudication must be a legally protected interest, not merely a financial interest. La Chemise Lacoste v. General Mills, Inc., 53 F.R.D. 596 (D. Del. 1971), aff'd 487 F.2d 312 (C.A. 3d, 1973).

A ruling in favor of the petitioners in this litigation would leave them with a substantial, viable judgment as against the respondents. In the event the respondents prevail, the respondents will have a viable judgment in that they will have fully and completely resolved the claims of petitioners against said respondents.

While some of the damages sought by the petitioners in this action will accrue to the minor child in the form of medical care provided for by damages recovered, a substantial portion of the damages sought will be for the parents' own losses suffered as a result of having to dramatically restructure every detail of their lives as a direct consequence of the negligence of respondents.

3. THE APPELLATE COURT DECISION INCORRECTLY CONCLUDES THAT THE CHILD WILL BE COLLATERALLY ESTOPPED.

As the court stated in Cortez v. County of Los Angeles, (cited supra):

> ". . . Adrian could not be collaterally estopped by his parents' litigation of their distinct legal right to recovery. See, e.g., Kaiser Foundation Hospital v. Superior Court, 254 Cal. App. 2d 327, 62 Cal. Rptr. 330 (1967)."

In the present action, if the decision of the court goes against the parents, the issues still will not have been determined adversely to the minor plaintiff in the state action. There are obviously entirely

different issues to be litigated: (1) the causal relationship between the respondents' conduct and the harm suffered by petitioners in this litigation; (2) the issue of whether the parents were contributorily negligent; and (3) the extent of damages suffered by the parents. In the case of Capelouto v. Kaiser Foundation Hospitals, 7 Cal. 3d 891, 500 P.2d 880 (1972), it is noteworthy that the matter brought by both parents and child in the same forum was decided in favor of the child and against the parents in a case where the causes of actions were pleaded similarly to those set forth in this litigation.

Armstrong v. Armstrong, 15 Cal. 3d 942 (1976) cannot be taken as precedent that the minor will be barred in subsequent litigation if the parents are unsuccessful.

The case of Ruddock v. Ohls, 91 Cal. App. 3d 271 (1979) places the Armstrong litigation in proper perspective. It demonstrates that where the prospective rights of the minor are later litigated, the minor is not barred by a prior adverse decision against the parents.

The court in Armstrong specifically stated:

> "Nor is this a case in which only prospective relief is sought."

In Ruddock v. Ohls (cited supra), the court held there was no privity between the mother and her child in a paternity action. There the court stated:

> ". . . We hold that in dealing with the prospective rights of a minor child to establish paternity, the

child, if not formally a party, is not bound by a paternity determination in a marital dissolution action . . . Armstrong distinguished . . . the prospective rights of a minor to establish the parent-child relationship (and the minor is) not foreclosed under the doctrine of res judicata or collateral estoppel by a judgment between the mother and alleged father. . ." (emphasis and parenthetical material added)

The great weight of California authority holds as follows:

"In general, it may be said that such privity involves

a person so identified in interest with another that he represents the same legal right." (Zaragosa v. Craven, 33 Cal. 2d 315, 318, 202 P. 2d 73 (1949); State Farm Insurance Co. v. Salazar, 155 Cal. App. 2d Supp. 861, 865, 318 P.2d 210 (1957); Margolis v. Superior Court, 151 Cal. App. 2d 333, 334, 311 P.2d 167 (1957).)

Note that both the Armstrong and Ruddock cases cited Zaragosa with approval.

"The same legal right" is not in issue here. As petitioners have painstakingly pointed out, the parents have an independent statutory right separate and distinct from that of the child.

In a case involving wrongful death, Kaiser Foundation Hospital v. Superior Court, 254 Cal. App. 2d 327, 62 Cal. Rptr. 330 (1967), Mr. and Mrs. Moore sued the defendants for damages from malpractice in medical treatment of Mrs. Moore; verdict and judgment were for the defendants. Then Mrs. Moore died, and Mr. Moore and daughter Linda, a minor, sued the same defendants for wrongful death, alleging the same acts of negligence and also breach of contract arising out of a medical service plan. Defendants move for summary judgment as to both plaintiffs; the trial judge granted the motion as to Mr. Moore and denied it as to Linda. The court held the ruling was correct.

1) Collateral estoppel was properly asserted against Mr. Moore, a party to the previous action. The issues were the same,

despite the claim for breach of contract; this is immaterial seeing it does not give rise to an action for wrongful death.

2) There was no collateral estoppel as to Linda, who was neither a party nor in privity with the party to the first action. 254 Cal. App. 2d 335.

While a specific California case has not been located which discusses the issue of collateral estoppel after a parent has sued under C.C.P. Section 376, indirectly analogous cases for loss of consortium, the vast majority of cases before American courts have adopted the view that the husband and wife are not necessarily in privity, and absent circumstances showing privity, have held a prior judgment against the husband and wife was not res judicata.

In Sove v. Smith, 311 F.2d 5 (6th Cir. 1962), the court stated at page 7:

"Mrs. Sove was not a party in her husband's litigation. As she has a separate and independent claim for her loss of consortium, she could not possibly have been in privity with her husband for his claim for bodily injuries. Her legal right is entirely distinct from that of her husband's legal right. Collateral estoppel cannot prevent Mrs. Sove from maintaining this action. . ."

See also De Vito v. Hoffman, 199 F.2d 468, 91 App. D.C. 263, (1952); Seymour v. Union News Co., 217 F.2d 168 (C.A. 7 Ill. 1954); Standard Accident Insurance Co. v. Doiron, 170 F.2d 206 (C.A. 1 Mass., 1948).

The decision below, therefore, is contrary to the express provisions of Rule 19(a), and the state authorities upon which said decision is premised do not support the position taken by the Court of Appeals. This court is urged to correct this incongruity.

CONCLUSION

The writ should be granted as asked.

DATED: March 12, 1985

Respectfully submitted,

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APPENDIX A

For Publication

F I L E D

JAN 15 1985

PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BARDOMIANO AGUILAR & ROSA AGUILAR, etc,.	NO. 83-6428
Plaintiffs-Appellants,	USDC NO. CV 83-4970-TJH
v.	
LOS ANGELES COUNTY, L.A. COUNTY/U.S.C. MEDICAL CENTER, et al.,	O P I N I O N
Defendants-Appellees.	

Submitted: October 3, 1984

Appeal from the United States
District Court For the Central
District of California
Hon. Terry J. Hatter,
District Judge, Presiding

Argued and Submitted:
October 3, 1984

Before: DUNIWAY, FERGUSON, and NELSON,
Circuit Judges.

NELSON, Circuit Judge:

Bardomiano and Rosa Aguilar appeal the dismissal of their medical malpractice action. The district judge based the dismissal on the Aguilars' failure to join an indispensable party, their son Jaime, whose joinder would defeat diversity jurisdiction. We affirm.

FACTS AND PROCEDURAL HISTORY

On August 2, 1983, appellants Rosa and Bardomiano Aguilar filed a medical malpractice suit against appellees County of Los Angeles, Los Angeles County/U.S.C. Medical Center, and several medical center employees ("County"). The Aguilars alleged that the County's negligence in providing medical care to their minor child, Jaime, caused him to sustain permanent brain damage. Under California Code of Civil Procedure

(C.C.P.) § 376, which provides that parents may maintain an action for injury to their child, the Aguilars sought to recover pre-majority special damages for Jaime's injuries.[1/] The Aguilars alleged that they were citizens of Mexico and El Salvador and that the defendants were citizens of California and based the district court's subject matter jurisdiction on diversity of citizenship. Their son Jaime, a California citizen, was not named as a plaintiff in the complaint.

On August 3, 1983, Jaime Aguilar, through his guardian ad litem, Rosa Aguilar, filed an action in the Los Angeles Superior Court to recover post-majority special damages and general damages for injuries caused by the County's alleged negligence.

The County moved to dismiss the federal action pursuant to Fed. R. Civ. P.

12(b)(6), failure to state a claim upon which relief can be granted, and Fed. R. Civ. P. 12(b)(7), failure to join a party under Fed. R. Civ. P. 19. On October 24, 1983, the district court granted the motion to dismiss the complaint and action under Fed. R. Civ. P. 12(b)(7) for failure to join Jaime Aguilar, an indispensable party whose joinder would defeat diversity jurisdiction. Adopting the reasoning in Lopez v. Martin Luther King, Jr. Hospital, 97 F.R.D. 24 (C.D. Cal. 1983), the court found that Jaime Aguilar claimed an interest relating to the subject of the action and that disposition of the action in his absence could impair or impede his ability to protect that interest under the California law of collateral estoppel. The court also determined under Fed. R. Civ. P. 19(a)[2/] that the County would be subject

to a substantial risk of incurring inconsistent obligations because of Jaime's claimed interest, should the action continue without his joinder as a party. The court further found that, pursuant to Fed. R. Civ. P. 19(b), the actions and complaint should be dismissed.

DISCUSSION

Fed. R. Civ. P. 19 establishes a two-step analysis for determining who should be joined in a given action. The first setp, set forth in subsection (a), determines which persons should be joined, if joinder is feasible. Under Fed. R. Civ. P. 19(a)(2), a person should be joined if he claims an interest relating to the subject of the action and is so situated that disposition in his absence could impair that interest

or subject the other parties to multiple or inconsistent liabilities. The second step of the Rule 19 analysis, set forth in subdivision (b), determines whether the action should be dismissed or proceed without the party if joinder is not feasible. Subsection (b) does not apply until the subsection (a) determinations are made. Bakia v. County of Los Angeles, 687 F.2d 299, 301 (9th CIr. 1982).

This case turns a Fed. R. Civ. P. 19 (a)(2) determination whether Jaime has an interest in the subject of this action that could be impaired -- and, if so, whether the action should have been dismissed under Fed. R. Civ. P. 19(b).

I

Jaime Aguilar's Interest and Its Impairment: Fed. R. Civ. P. 19(a)(2)

The district court concluded that Jaime Aguilar had an interest in his parents' action that could be impaired under the California law of collateral estoppel. While Fed. R. Civ. P. 19 cases are generally reviewed under an abuse of discretion standard, Bakia v. County of Los Angeles, 687 F.2d 299, 301 (9th Cir. 1982), to the extent that the determination of Jaime's interest and its impairment under Fed. R. Civ. P. 19(a)(2) involved an interpretation of California collateral estoppel law, it is reviewed under a de novo standard. In re McLinn, 739 F.2d 1395, 1397 (9th Cir. 1984).

The doctrine of collateral estoppel, as interpreted in California law, bars parties, or those in privity with them,

from relitigating any issue actually litigated, determined, and necessary to the disposition of a former proceeding. In re Russell, 12 Cal. 3d 229, 233, 115 Cal. Rptr. 511, 513 (1974). Application of the collateral estoppel doctrine thus depends on an affirmative answer to three questions: (1) was the issue decided in the prior adjudication identical to the one presented in the action in question? (2) was there a final judgment on the merits? (3) was the party against whom the doctrine is asserted a party or in privity with a party to the prior adjudication? Levy v. Cohen, 19 Cal. 3d 165, 171, 137 Cal. Rptr. 162, 166 (1977).

Fed. R. Civ. P. 19(a)(2) states that a person should be joined if disposition of the action in his absence may as a practical matter impair or impede his ability to protect that interest. Although Jaime

seeks to recover different damages (post-majority) from that of his parents (pre-majority), his right to recovery, like his parents', depends on a determination of the County's negligence. If his parents' suit is allowed to proceed, and the County is found non-negligent, Jaime may be collaterally estopped from pursuing his own suit in state court, the district court here properly found him to have an interest in his parents' action that could be impaired if that action goes forward without him as a party.

The Aguilars contend that the district court erred. They maintain that the collateral estoppel doctrine is inapplicable here because Jaime is not in privity with them. Privity, they argue, "involves a person so identified in interest with another that he represents the same legal

right." Zaragosa v. Craven, 33 Cal. 2d 315, 318, 202 P. 2d 73, 76 (1949); State Farm Ins. Co. v. Salazar, 155 Cal. App. 2d 861, 865, 318 P. 2d 210 (1957). The Aguilars contend that C.C.P. § 376 gives them a distinct and independent cause of action from Jaime's, and that they are therefore not in privity with Jaime.

As support for their position, the Aguilars rely on Cortez v. County of Los Angeles, 96 F.R.D. 427 (C.D. Cal. 1983). Cortez involved a dismissal for non-joinder of an indispensable party in a fact situation identical to the one now before this court, and identical to that in Lopez v. Martin Luther King, Jr. Hospital, 97 F.R.D. 24 (C.D. Cal. 1983), the case the district court followed. In Cortez, the court refused to dismiss the parents' medical malpractice action based on diversity of

citizenship for failure to join their injured son and concluded that the child had no legally protected interest in his parents' lawsuit. Like the Aguilars, the Cortez parents sued for pre-majority damages in federal court and the son sued for post-majority damages in state court. The court reasoned that the child would not be collaterally estopped from obtaining relief in state court because he and his parents asserted distinct legal rights to recovery and were therefore not in privity.

We affirm the district court's choice of the reasoning in Lopez v. Martin Luther King, Jr. Hospital, 97 F.R.D. 24 (C.D. Cal. 1983), rather than that in Cortez v. County of Los Angeles, 96 F.R.D. 427 (C.D. Cal. 1983). Lopez properly construed the Rule 19(a)(2) "interest" requirement as not

limited to a "legal" interest, but one to "be determined from a practical perspective, not through the adoption of strict legal definitions and technicalities." Lopez, 97 F.R.D. 24, 29 (C.D. Cal. 1983). This reasoning is supported by ample authority. See Provident Trademen's Bank & Trust Co. v. Patterson, 390 U.S. 102, 110 (1968); Kaplan v. International Alliance of Theatrical & State Employees, 525 F.2d 1354, 1361 (9th Cir. 1975); Smith v. State Farm Fire & Casualty Co., 633 F.2d 401, 405 (5th Cir. 1980). The Aguilars' approach, which emphasizes the distinct legal causes of action asserted by parents and child, focuses on legal technicalities and runs contrary to the prevailing view that "interest" under Rule 19 should be determined from a practical and not technical, perspective.

The Aguilars also rely on Kaiser Foundation Hospital v. Superior Court, 254 Cal. App. 2d 327, 62 Cal. Rptr. 330 (1967). Kaiser involved the collateral estoppel effect of a prior judgment on a subsequent suit brought against the same hospital. A husband and wife had sued defendant hospital for injuries caused to the wife and judgment was rendered for the hospital. After the wife's death, the husband and daughter brought a wrongful death action against the same hospital. The court held that because the daughter had a distinct cause of action, she was not in privity with a party to the first action and could not be collaterally estopped, though the husband could not sue again. Kaiser, 254 Cal. App. 2d 327, 333, 62 Cal. Rptr. 330, 333 (1967).

Kaiser, however, reflects outdated notions of privity under the California law of collateral estoppel. The concept of privity "has been expanded . . . to a relationship between the party to be estopped and the unsuccessful party in the prior litigation which is 'sufficiently close' so as to justify the application of the doctrine of collateral estoppel." Lopez, 97 F.R.D. 14, 30 (C.D. Cal. 1983); Clemmer v. Hartford Ins. Co., 22 Cal. 3d 865, 875, 151 Cal. Rptr. 285, 289 (1978). Lynch v. Glass, 44 Cal. App.3d 943, 948, 119 Cal. Rptr. 139, 143 (1975). For example, the California Supreme Court has applied the collateral estoppel doctrine to prevent children from relitigating an issue decided in a previous action brought by their mother. Armstrong v. Armstrong, 15 Cal. 3d 942, 126 Cal. Rptr. 805 (1976).

As in Armstrong, a California court could well apply the collateral estoppel doctrine to bar Jaime's suit if his parents' suit is allowed to proceed and proves unsuccessful, since the underlying issue of the County's negligence is identical in both suits. See Zaragosa v. Craven, 83 Cal. 2d 315, 202 P.2d 73 (1949) (fact that parties have different causes of action is immaterial, since underlying issue of liability is identical to both parties.)

The Aguilars assert that Armstrong involved only retroactive rights and not the prospective rights involved here, and that Ruddock v. Ohls, 91 Cal. App. 3d 271, 154 Cal. Rptr. 87 (1979), prevents application of the collateral estoppel doctrine when the prospective rights of a minor are involved. In Ruddock, the court held that children were not collaterally estopped

from relitigating the issue of paternity, although non-paternity had been established in a prior marital dissolution suit. Id. at 286. However, Ruddock is distinguishable since it involved paternity, which the court described as "the most fundamental right the child possesses." Id. at 277-78. Moreover, a California court could ignore this prospective/retrospective distinction and apply the Armstrong court's reasoning to collaterally estop Jaime from pursuing his state action. Rule 19 speaks to possible harm, not only to certain harm.

We conclude that Jaime should have been joined in his parents' action because under Fed. R. Civ. P. 19(a)(2), he has an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may

impair or impede his ability to protect that interest.

II
The Equity and Good Conscience Test Under Rule 19(b)

Since the district court properly determined that Jaime, having an interest in the subject of his parents' action that could be impaired under California collateral estoppel law, should therefore be joined, if feasible, it was appropriate for the court to turn to Rule 19(b). Since Jaime could not be joined without destroying diversity jurisdiction, the district court dismissed the action rather than allow it to proceed without joinder.

The district court's dismissal for failure to join an indispensable party under Fed. R. Civ. P. 19 is reviewed under

an abuse of discretion standard. Walsh v. Centeio, 692 F.2d 1239, 1241 (9th Cir. 1982); Bakia v. County of Los Angeles, 687 F2d 299, 301 (9th Cir. 1982). The Aguilars are incorrect in their assertion that the district court's dismissal of their actions and complaint amounted to a summary judgment that is reviewable de novo.

The district court had adequate grounds to find that each of the factors in Rule 19(b), which represent an attempt to balance the rights of all those affected by the litigation, mandated dismissal in this case. The Aguilars have an adequate alternative forum, state court, in which they can obtain relief. By having to defend two separate lawsuits turning on the same issues, the County would be subjected to multiple litigation and possibly

inconsistent obligations. There is potential prejudice to Jaime, since he could be collaterally estopped from pursuing his state action if his parents' suit is allowed to proceed and is unsuccessful. In light of these facts, the district court did not abuse its discretion in dismissing the action.

CONCLUSION

The district court correctly dismissed the action for non-joinder under Fed. R. Civ. P. 19.

AFFIRMED.

FOOTNOTES

1/ California Code of Civil Procedure § 376 provides, in relevant part, as follows: "The parents of a legitimate unmarried minor chid, acting jointly, may maintain an action for injury to such child caused by the wrongful act or neglect of another."

2/ Fed. R. Civ. P. 19 provides, in relevant part, as follows:

> Rule 19. Joinder of Persons Needed for Just Adjudication
>
> (a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of

the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenver Joinder not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a

judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

F I L E D
JAN 15 1985
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

Aguilar v. County of Los Angeles -
No. 83-6428

FERGUSON, Circuit Judge, dissenting:

The majority reasons that because Jaime may be collaterally estopped, this is sufficient to uphold the district court's finding Jaime has an interest in his parents' action which could be impaired if that action goes forward without him as a party. I dissent.

I believe the majority, in adopting the reasoning in Lopez v. Martin Luther King, Jr. Hospital, 97 F.R.D. 24 (C.D. Cal. 1983), has put the cart before the horse. In Lopez, the district court stated what was believed to be the relevant inquiry as follows: "[I]f there is a possibility

that collateral estoppel will be applied by the California court, then it is axiomatic that the child has an interest in this action." 97 F.R.D. at 30.

The majority in this case employed this exact reasoning, finding that this "interest" determination is properly construed "'from a practical perspective, not through the adoption of strict legal definitions and technalities.'" (Opinion at p. 7, citing Lopez v. Martin Luther King, Jr. Hospital, 97 F.R.D. at 29).

While the question of joinder is one of federal procedure, in diversity cases the standards must be applied to the rights and interests that are derived from and defined by state law. Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 125 n.22 (1968). In this case, section 376 of the California Code of Civil Procedure

provides the Aguilars with a separate and independent cause of action from that asserted by Jaime in state court. Faitz v. Ruegg, 114 Cal. App. 3d 967, 971, 171 Cal. Rptr. 149, 150 (1981) (right to recover for loss of child's earnings and for medical expenses incurred in treating its injuries belongs to parent).

To be sure, Jaime has an obvious financial stake in the outcome of his parents' action, but this cannot support the legally protected "interest" in the instant action from mere speculation that collateral estoppel might be applied in Jaime's separate state court action.

Even assuming Jaime has the required interest in his parents' action, Rule 19(a) is satisfied only if the disposition of the action in his absence would either (i) as a practical matter impair or impede

his ability to protect that interest, or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his claimed interest.

This court concludes that "[s]ince a California court may find Jaime collaterally estopped from pursuing his own suit in state court, the district court here properly found him to have an interest in his parents' action that could be impaired if that action goes forward without him as a party." To the contrary, I agree with both the holding and reasoning of Judge Cynthia Holcomb Hall's decision in Cortez v. County of Los Angeles, 96 F.R.D. 427 (C.D. Cal. 1983). Like Lopez, the facts in Cortez were identical to those present here. Judge Hall found the minor

child in that case "could not be collaterally estopped by his parents' litigation of their distinct legal right to recovery." 96 F.R.D. at 429.

Here, the application of Rule 19 requires inquiry into the effect on Jaime of any relief granted to his parents, and whether "as a practical matter" such may "impair or impede his ability to protect his interest."

> The language "as a practical matter" has a restrictive as well as an expansive side. Thus, the fact that the absent person may be bound by the judgment does not of itself require his joinder if his interests are fully represented by parties present, and the mere theoretical possibility of prejudice does not require joinder.

3A Moore's Federal Practice, ¶ 19.07-1[2.-1], at 19-133 (2d ed. 1982) (footnotes omitted). As pointed out by

Judge Hall, these parents, like those in Cortez, have every incentive to reach a result that will benefit their child's legal interest as well as their own. This is not a case where one party may do something to affect wrongfully the rights of a nonparty. All inferences point to the fact that these parents will vigorously do all they can to protect their child and make every argument Jaime would or oculd make if he were a party. Indeed, Rosa Aguilar is the appointed guardian ad litem in Jaime's state court action, charged with the responsibility to litigate that case in Jaime's best interests. To presume Jaime's interest will be prejudiced if this action is allowed to proceed without him as a party flies in the face of common sense and recognized familial bonds.

In applying Rule 19 "courts must refrain from taking a view either too broad or too narrow in determining 'prejudicial' effect of a judgment. The watchwords of Rule 19 are "pragmatism' and 'practicality.'" Schutten v. Shell Oil Co., 421 F.2d 869, 874 (5th Cir. 1970). "Rather the courts are urged to consider whether the absentee would be 'adversely affected in a practical sense, and if so, would the prejudice be immediate and serious, or remote and minor?'" Gottlieb v. Vaicek, 69 F.R.D. 672, 675 (N.D. Ill. 1975), aff'd, 544 F.2d 523 (7th Cir. 1976).

The second prong of the Rule 19(a) inquiry would require Jaime's joinder if his absence would leave any of the parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations. Following the reasoning of

Judge Hall in Cortez and as set forth above, there is no risk of double or multiple liability to defendants in this case because Jaime's parents claim damages under their independent cause of action established by section 376 of the California Code of Civil Procedure. Thus, I conclude Jaime is not a person who should be joined in this action and, therefore, an analysis of whether the equities of the case require dismissal pursuant to Rule 19(b) is unnecessary.

I would adopt the decision of Judge Hall in Cortez v. County of Los Angeles, 96 F.R.D. 427 (C.D. Cal. 1983), and reverse the district court and remand for further proceedings.

APPENDIX B

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CENTRAL DISTRICT
OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BARDOMIANO AGUILAR and ROSA AGUILAR, husband and wife suing pursuant to C.C.P. § 376, and suing individually,	Civil No. 83-4970 TJH
Plaintiffs,	ORDER DISMISSING ACTIONS AND COMPLAINT

vs.)
)
LOS ANGELES COUNTY, etc., et al.,)
)
Defendants.)
)

On October 24, 1983, the motions of Defendant County of Los Angeles to dismiss and strike portions of the complaint, was heard. Martin Stein of Horvitz & Greines appeared on behalf of the moving party and Manuel Hidalgo appeared on behalf of Plaintiffs.

After considering the moving and opposing papers and the oral presentations of Plaintiffs and Defendant, and the decision of Judge Edward Rafeedie in Lopez, et al. v. Martin Luther King, Jr. Hospital, et al., (C.D. Cal 1983) 97 F.R.D. 24, the Court, being fully advised in the premises and good cause appearing therefor, orders that the motion to dismiss of Defendant

herein be, and hereby is, granted for the reasons expressed by Judge Rafeedie, in Lopez, supra, which reasoning is hereby incorporated by reference in this order.

As in Lopez, the Court orders the actions and the complaint herein dismissed on the grounds that Plaintiffs have failed to join an indispensable party, namely, the minor Jaime Aguilar, whose joinder would defeat diversity jurisdiction of this Court, pursuant to Rule 19, Federal Rules of Civil Procedure. The Court finds that the minor claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may, as a practical matter, impair or impede his ability to protect that interest under the California law of collateral estoppel (Rule 19, subdivision (a)(1)) and Defendant would be subject to a substantial

risk of incurring inconsistent obligations by reason of his claimed interest, should the action continue without his joinder. (Rule 19, subdivision (a)(ii).)

The Court further finds, pursuant to the equity and good conscience test of Rule 19, subdivision (b), Federal Rules of Civil Procedure, that the actions and complaint should be dismissed for each of the reasons expressed by the Court in Lopez, supra, 97 F.R.D. at pp. 32-33, i.e., Plaintiffs have available to them an alternative and adequate forum to pursue their suit, namely, in the pending state action brought by their minor child; if this action were not ordered dismissed, Defendant would potentially be subject to multiple litigation or inconsistent judgments; the absent minor, Jaime Aguilar has an interest which may be prejudiced if this action were

not ordered dismissed; and the interests of the courts and the public in complete, consistent and efficient settlement of controversies are best served by dismissal of the complaint.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiffs' complaint on file herein be, and hereby is dismissed.

DATED: NOV 14 1983

TERRY J. HATTER, JR.
Terry J. Hatter, Jr.
United States District
Court Judge